United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2020

No. 74-2020

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CLAUDIA FROST, et al.,

Plaintiffs-Appellees,

CASPAR WEINBERGER, as Secretary
of the United States Department
of Health, Education and Welfare,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEES

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STATEMENT OF THE CASE

In February, 1973, the Social Security Administration notified the plaintiff Claudia Frost and two of her small children, the minor plaintiffs, that their Social Security survivors' benefits were going to be reduced. (App. 6-7, 14, 29, 73, 77, 78). The reduction was a substantial one, amounting to $190.80 per month, some forty percent (40%) of the Frosts' monthly benefits. (App. 6-7, 21, 77).

The basis for the reduction was a determination by the Social Security Administration that Mrs. Frost's late husband, who had died in August, 1968, was not only the father of the two minor plaintiffs, her children, but was also the father of two children born out-of-wedlock to another woman, one Lola Coolidge. (App. 7, 14). Faced with this contention four and one-half years after her husband's death, Mrs. Frost in her written reconsideration request was unable to present any evidence to prove the negative, that her husband had not been the father of these other children.(App. 14, 16, 30, 98).*

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* The defendant has asserted that Mrs. Frost was first advised of these claims in 1969.(Appellant's Brief, p. 6). This point was not relied on by the plaintiffs in their uncontroverted statement of facts pursuant to Rule 9(g) (App. 80-82), but the record does not support the defendant's version of the facts. His version is not based on any competent evidence, its only support being a hearsay affidavit by his counsel based upon a telephone conversation with some unidentified person in the Office of General Counsel of the Social Security Administration.(App. 26, 27). While this claim was never further substantiated, it reappeared three months later in the defendant's Rule 9(g) statement (App.73), and was duly contested by the plaintiffs'9(g) statement.(App. 80). The affidavit of Mrs. Frost (App. 27) and the complaint, incorporated by reference therein, explicitly state that she first learned of these claims in 1973. (The complaint is not reproduced in the appendix but is identical on this point to the amended complaint. (App. 7-8)).

That reconsideration procedure was not an adversary proceeding; it was based upon the Social Security Administration's file and Mrs. Frost's written statements (App. 30, 78), and Mrs. Frost had no opportunity to confront and cross-examine Ms. Coolidge.* The reconsideration determination (App. 14-17) asserted that the children of Ms. Coolidge "were born out-of-wedlock to Mr. Frost and Lola Coolidge" without even setting forth a single basis for that conclusion (App. 14). After a two page recitation of the applicable law and no factual showing (App. 14-16) the reconsideration determination reiterated the already known conclusion of law: "The Social Security Administration determined that the children born to Lola Coolidge ... were fathered by Charles Frost, Jr."(App. 16). The decision then dealt with Mrs. Frost's efforts to rebut that conclusion:

> Although Claudia Frost has disputed the determination ... she has submitted absolutely no evidence to support her contention. Consequently the finding that the two children born to Lola Coolidge are entitled children will remain undisturbed. (App. 16).

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* While the parties disputed whether or not Mrs. Frost was ever granted the right to examine the evidence on which the decision was based (App. 8, 21, 27), it appears from the Social Security Claims Manual, section T308(b), that such evidence is not immediately available at the district office to which the beneficiary makes an inquiry, but that the district office must "request it from the reviewing office" (App. 56); the reviewing office is where the factual adjudication is made (App. 57). Mrs. Frost filed for reconsideration one week from the date the reduction notice was sent, so any review of the evidence would have been unlikely (App. 14, 29-30).

The reconsideration determination was issued on May 2, 1973 (App. 16), and two weeks later Mrs. Frost requested an oral hearing.(App. 9, 30, 74, 78, 81). Nonetheless, commencing in June, 1973, the Frosts' survivors' benefits were reduced by $190.80 per month, a reduction of forty percent (40%). (App. 9, 21, 78, 81).

Almost four months after that hearing request no hearing had even been scheduled, so having received their last four monthly checks each reduced by $190.80, the Frosts commenced this action on September 14, 1974.(App. 1, 9, 21, 30). By then the plaintiffs' circumstances had substantially worsened because of this large cut in their income. They were unable to meet credit and rent commitments (the rent taking 45% of their reduced family income), utility bills had fallen into arrears and new school clothes could not be bought.(App. 22). Indeed, the plaintiffs had been reduced from a position of at least adequate maintenance to the official "poverty threshold" established by the Social Security Administration itself. (App. 24-25).

It was in this posture that the plaintiffs moved for interlocutory relief.(App. 18-25). In response the Secretary submitted a hearsay affidavit of counsel (App. 26), and the reason advanced for not yet having provided the Frosts with a hearing was that, "The delay between May and September was occasioned because the hearing examiner cannot schedule a hearing until he receives the claims folder." (App. 30). The defendant also asserted that "because of the commencement of this action, the Social Security Administration postponed a hearing pending determination

of this action." (App. 28) Faced with this position of the Secretary that no hearing would be held until after the action was over, Judge Travia ordered that the defendant "hold an administrative hearing in this matter within one month." (App. 47).

That hearing was held on November 26, 1973. Finally Ms. Coolidge was present for confrontation and cross-examination by Mrs. Frost and her counsel.(App. 98). The scope of the factual dispute involved is evident from the hearing decision, a factual analysis of over four single spaced pages (App. 100-104) based on thirty-two (32) exhibits from the file, totalling fifty-seven (57) pages, plus another five exhibits entered during the hearing, totalling another twenty-five (25) pages.(App. 105-107). In addition to those thirty-seven (37) exhibits amounting to eighty-two (82) pages the parties submitted another nine exhibits after the hearing, totalling an additional thirty-four (34) pages. (App. 107-108).* Such was the array of facts which Mrs. Frost was supposed to meet without an opportunity for any oral presentation, confrontation or cross-examination, but by written reconsideration.

No decision was rendered by the administrative law judge for over three months from the time the hearing was held and over ten months from the date the hearing was requested - - the

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* The hearing decision was not based upon the subsequent submissions, except for a brief submitted by counsel for the Frosts. (App. 98-99).

decision was dated March 4, 1974, four days before argument of the cross-motions for summary judgment, which had been filed in early February, 1974, pursuant to prior stipulation.(App. 2, 3, 104, 115-116).

The plaintiffs contended that the reduction of survivors' benefits without affording the opportunity for a prior oral hearing violated the due process clause of the Fifth Amendment.(App. 10-11). The plaintiffs also moved for a determination that the action be maintained as a class action (App. 32-39), and at oral argument of the class action motion counsel for the parties consented to having the class action issue determined at the same time as the determination on the merits. (App. 54, 116). On the merits the Secretary asserted that the case was moot and defended the constitutionality of his procedures, two of the issues raised on appeal.(App. 51, 54).* None of the grounds for denying class action relief which were raised below prior to judgment is raised on appeal.(App. 40-43).

The District Court issued an extensive thirty-seven page decision on the merits and on the class action issue, rejecting all of the defendant's contentions and granting the plaintiffs' class action motion and summary judgment motion, but limiting relief to declaratory judgment since a hearing had been held pursuant to court order (App. 144).** Judgment was duly entered on May 28, 1974.(App. 146-148).

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* Several other defenses have been abandoned on appeal.

** The decision is reported at 375 F.Supp. 1312.

In the decision and judgment the District Court ordered the defendant to adopt new procedures conforming to the due process requirements for prior hearings "as soon as practically convenient." (App. 145, 148). The judgment has been promptly appealed, and, as of the date of the Appellant's brief, "The Secretary has not changed his procedures." (p.19).

On June 13, 1974, sixteen (16) days after the entry of judgment, and over a month after the decision, the defendant moved to amend the judgment and there first advanced the contention that class action relief should be denied on the basis of the Supreme Court's decision in Eisen v. Carlisle & Jacquelin, 42 LW 4804 [94 S.Ct. 2140]. Now, on appeal, the defendant asserts that notices should have been sent to the cla , (Appellants brief, point IA), relying partly on Eisen but largely on other grounds.

ARGUMENT

POINT I

THE DISTRICT COURT CORRECTLY DETERMINED THAT THE REDUCTION OF SURVIVORS' BENEFITS WITHOUT PROVIDING AN OPPORTUNITY FOR A PRIOR HEARING VIOLATES DUE PROCESS.

The determination by the District Court that due process requires that an oral evidentiary hearing be afforded before Social Security survivors' benefits can be reduced is correct in all respects. Continued receipt of survivors' benefits is an important right which requires that the Secretary provide the opportunity for a hearing and determination therein before any benefit reduction takes effect.

The record here amply demonstrates both the need for a hearing and the defects in the Secretary's current procedures. Here a reduction of over $190.00 per month, forty percent (40%) of the family's benefits, was put into effect on the basis of a factual determination concerning events that took place over four years before.(App. 7, 14, 21, 77-78). Almost four months after the plaintiffs had requested a hearing none had even been scheduled,so this action was brought; and the hearing decision was not rendered until over three months after the hearing.(App. 9, 21, 30, 74, 78, 81, 98-104). The scope of the factual dispute is obvious from the very question raised, "Was the decedent the father of two illegitimate children over four years before?" The scope of the dispute is also plain from the thirty-seven (37) exhibits, eighty-two (82) pages in all, introduced at the hearing. (App. 105-107). Thirty-two (32) of these exhibits, a total of fifty-seven (57) pages, were in the file before the hearing, and apparently

the basis of the determination that the Frosts were supposed to counter simply by submitting written evidence to the contrary.* (App. 105-107).

Since the Supreme Court's decision in Goldberg v. Kelly, 397 U.S. 284 (1970), recipients of public assistance benefits under programs for which the Secretary has federal administrative responsibility ** have had the basic rights to prior hearings which the Secretary has refused to provide to recipients of Social Security survivors' benefits. Recipients of Social Security benefits are no less entitled to due process safeguards than are public assistance recipients, and a host of courts have unhesitatingly applied Goldberg to the various Social Security programs administered by the Secretary. See, e.g. Williams v. Weinberger, 494 F.2d 1191 (5th Cir. 1974); Eldridge v. Weinberger, 493 F.2d 1230 (4th Cir. 1974); Mattern v. Weinberger, 377 F.Supp. 906 (E.D. Pa. 1974); Elliott v. Weinberger, 371 F.Supp. 960 (D.Haw. 1974); Buffington v. Weinberger, No. 734-73C2 (W.D. Wash. Oct. 22, 1974).***

Goldberg v. Kelly, supra, is the modern genesis of the rule that due process requires the opportunity for an oral hearing

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* Such elaborate factual disputes are not uncommon in survivors' benefits cases. In a recent case a 73 year old widow reportedly had her widow's benefits terminated by the Social Security Administration based on her late husband's allegedly having married another woman in Czechoslovakia 57 years ago and never having been divorced. N.Y. Times, Sept. 29, 1974, p.46 A similar factual dispute underlay Anderson v. Richardson, 454 F.2d 596 (6th Cir. 1972), a case involving the right to a hearing prior to termination of survivors' benefits.

** See 42 U.S.C. sections 601 et seq.

*** Petitions for certiorari are pending in Williams and Eldridge and the other cases are on appeal. In Buffington a class injunction was granted and on November 26, 1974, the Secretary's motion for a stay was denied by the Court of Appeals for the Ninth Circuit.

rather than merely a chance to submit written statements and evidence before there can be any reduction of public benefits based upon disputed facts. Just as is the case here, the defendant in Goldberg contended that a written review prior to reduction was sufficient, but the Court held that such a paper hearing did not satisfy due process (397 U.S. at 258-260).

Subsequently the Supreme Court indicated that Goldberg should not be given a "narrow reading." Fuentes v. Shevin, 407 U.S. 67, 88 (1972). As Mr. Justice Stewart pointed out there, applying Goldberg solely to "the deprivation of such basically 'necessary' items as wages and welfare benefits" incorrectly "reflects the premise that [Goldberg] marked a radical departure from established principles of procedural due process." (Id.). To the contrary, he explained that Goldberg was

> in the mainstream of past cases, having little or nothing to do with the absolute 'necessities' of life but establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect. (Id.).

The test for whether or not due process requires a prior hearing is not "brutal need," as the Secretary contends (Appellant's brief, p.26), but whether or not the property rights affected are "important interests," such as the automobile registration and operator's permit at issue in Bell v. Burson, 402 U.S. 535, 539 (1971). Accord Fuentes v. Shevin, supra, at 89. Plainly the survivors' benefits here are just as "necessary" as were the household goods in Fuentes and the license and registration in Bell.

Even under the "necessities" test advanced by the Secretary, these benefits were surely as important to Mrs. Frost and her children as were the wages in Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). In Sniadach the wage earner was subjected to a wage garnishment which reduced his wages by one-half (395 U.S. at 338). That substantial a deprivation was enough "as a practical matter [to] drive a wage-earning family to the wall." (395 U.S. at 341-342). Here the deprivation amounted to forty percent (40%) of the plaintiffs' Social Security benefits and the record demonstrates the untoward effects it had on their ability to meet their rent and bills. (App. 22). See Almenares v. Wyman, 334 F.Supp. 512, 521 (S.D.N.Y. 1971), aff'd 453 F.2d 1075 (2d Cir. 1971), cert. denied, 405 U.S. 944 (1972). The contention that the Frosts were not sufficiently deprived to be entitled to a prior oral hearing is wholly incompatible with reality.*

It is likewise irrelevant for the purposes of due process that the Frosts' benefits were only reduced rather than terminated

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* A study by the Social Security Administration itself showed that survivors' benefits were the "major source of income" for 2/3 of the beneficiary families. E. Palmore, G. Stanley, & R. Cormier, Widows with Children Under Social Security, p. 15 (1966). An article by the Commissioner of the Social Security Administration pointed out that survivors' benefits have "taken over much of the load that had been carried by aid to families with children." R. Ball, Policy Issues in Social Security, 29 Social Security Bulletin 3, 4 (1966). It is thus apparent that survivors' benefits are but a substitute for public assistance and should be treated in the same fashion - - indeed Mrs. Frost's other child, not fathered by the decedent, receives public assistance under the Aid to Families with Dependent Children program.(App. 6, 110). See Elliott v. Weinberger, 371 F.Supp. 960, 967 n.17 (D. Haw. 1974), quoting the Social Security Administration's own Claims Manual (§5000) that most beneficiaries rely on their check "for the necessities of life."

entirely. While Goldberg involved merely terminations the Secretary's response to Goldberg was to promulgate regulations giving public assistance recipients identical rights whether their benefits were reduced or were terminated. 35 Fed. Reg. 8448 (1970). See 45 C.F.R. section 205.10(a)(4), currently in effect. Likewise under the new Supplemental Security Income Program (SSI) the Secretary has recognized that recipients must be allowed to present "oral and written evidence" (emphasis supplied), allowed "to present witnesses," and allowed "to request that the Administration subpoena adverse witnesses and provide for cross examination" before any reduction of benefits. 20 C.F.R. sections 416.1417(a-c), 416.1418, and 416.1419 (Proposed; 39 Fed. Reg. 1053, 1054-1055; Jan. 4, 1974).

Faced with the Secretary's contention that under those regulations he could nonetheless reduce SSI benefits in certain circumstances, the court in Lyons v. Weinberger, 376 F.Supp. 248, 261-262 (S.D.N.Y. 1974), relying on Goldberg, held that hearings were required for reductions just like they are for terminations. The Court explained that "even a reduction of a few dollars may have a devastating effect, especially when recipients make purchases or sign leases expecting that their benefits will continue at the same level." (376 F.Supp. at 261). That is just what happened here. (App. 22).

The same result was reached for reductions of public assistance benefits in Hunt v. Edmunds, 328 F.Supp. 468, 475 (D. Minn. 1971; 3 judge court), where Judge Neville held that a reduction of $70.00 per month, little more than a third of the reduction here, required the opportunity for a prior hearing because it would "adversely

affect [the recipients'] ability to subsist by contemporary standards."* That is exactly the result here, where the plaintiffs were reduced to the "poverty threshold" defined by Social Security itself. (App. 24-25).

It is not surprising that three courts have thus held that reductions of Social Security benefits because of alleged overpayments require the opportunity for a prior oral evidentiary hearing. Mattern v. Weinberger, 377 F.Supp. 906 (E.D. Pa. 1974); Elliott v. Weinberger, 371 F.Supp. 960; Buffington v. Weinberger, No. 734-73C2 (S.D. Wash. Oct. 22, 1974). As Judge King put it in Elliott:

> The application of Goldberg to this case is simply inescapable. Since most social security recipients depend upon their full benefits for the necessities of life, the adverse impact of an erroneous suspension or reduction upon them is great. Starvation may be slower if benefits are reduced or suspended rather than terminated as in Goldberg, but some recipients will suffer nonetheless. (371 F. Supp. at 969-970).

The reductions in question in Elliott ranged from as little as $10.00 per month for one plaintiff to a high of $132.00 per month for another plaintiff; in all cases the reductions were far less than the reduction of $190.80 per month, 40% of the total, here.

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* See dictum that notice and the opportunity to be heard is constitutionally required before a reduction of public assistance benefits, Hagans v. Wyman, 462 F.2d 928, 931 (2d Cir. 1972), reversed on other grounds, sub nom. Hagans v. Lavine, 415 U.S. 528 (1974). See also Almenares v. Wyman, 334 F.Supp. 512, 517 (S.D.N.Y. 1971), aff'd. 453 F.2d 1075 (2d Cir. 1971), cert. denied, 405 U.S. 944 (1972).

Elliott v. Weinberger, 1A CCH Unempl. Ins. Rep. ¶17,135 at 1987-1988 (D. Haw. 1973; on motion for preliminary injunction). In Mattern only $30.00 per month was at stake (377 F.Supp. at 909). The fact is that for persons receiving Social Security benefits any reduction is important enough to require the opportunity for a prior oral hearing.

The defendant contends that the procedures he has presently promulgated are a sufficient "hearing" under the circumstances. (Appellant's brief, p.22). Of course, those procedures are not a "hearing" at all. The essence of due process is that the hearing be "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965). Accord, Goldberg v. Kelly, 397 U.S. 254, 267 (1970). Not only do the current procedures fail to provide for the critical element of oral presentation or "the opportunity to confront and cross-examine adverse witnesses," required under Goldberg v. Kelly, supra (397 U.S. at 269), but additionally they are woefully slow.

Now the oral hearing occurs months after the reduction in benefits has taken place. When Mrs. Frost filed this action almost four months had passed since she had requested a hearing but none had yet been scheduled. (App. 9, 21, 30, 74, 78). The statistics show that overall the process is equally slow. During the fiscal year 1970, for example, the median elapsed days from the date a hearing was requested to the date of decision was 112 days. R. Dixon, The Welfare State and Mass Justice: A Warning from the Social Security Disability Program, 1972 Duke L. J. 681, 696 n.74. Cf. Elliott v. Weinberger, 371 F.Supp. 960, 970-971 n.31 (D. Haw. 1974) referring to a two year appeals process. In the face of such

extended delay a recipient whose benefits have been reduced is offered little succor by receiving a reconsideration determination as uninformative as the one here and then being able to "request a full-scale oral hearing ... and ... prosecute appeals to the Appeals Council and to the courts."(Appellant's brief, p.26).

The availability of very timely hearings was a critical element in the recent decision in Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974). While the cases discussed supra were decided prior to Mitchell,that decision does not alter the result in this case. In Mitchell the Court approved a state procedure for the prejudgment sequestration of consumer goods in which, under state law, the seller retained a vendor's lien. The property was seized pursuant to the writ on February 7, and the consumer's motion to dissolve the writ, made on March 3, was heard on March 14, just eleven days after he had made his formal objections. As the Court explicitly stated:

> The debtor may immediately have a full hearing on the matter of possession following the execution of the writ, thus cutting to a bare minimum the time of creditor or court supervised possession. [The consumer in Mitchell apparently did not proceed as promptly as he could have under the law, however]. (Emphasis supplied) (416 U.S. at 610).

This element of timely hearings has been considered critical, in light of Mitchell, in Sugar v. Curtis Circulation Co., N.Y.L.J. Oct. 28, 1974, p. 1 (S.D.N.Y. No. 74-78, Oct. 17, 1974; 3 judge court), where the court held New York's prejudgment attach-

ment provisions unconstitutional because they did not "grant the debtor-defendant an immediate postseizure hearing." (Emphasis supplied). Indeed, as the Court further pointed out in Sugar, under the procedure approved in Mitchell, once the defendant had challenged the seizure, the burden of proving the grounds upon which the property was seized shifted to the creditor. Here there is neither a timely hearing nor, as the reconsideration determination shows, did the burden even shift from Mrs. Frost to negate the determination of the Social Security Administration.

The other critical factors in the Mitchell decision likewise do not support the Secretary's position here. Under state law in Mitchell the creditor retained a vendor's lien, but only so long as the debtor did not transfer the property. 416 U.S. at 608-609. See The Supreme Court, 1973 Term, 88 Harv. L. Rev. 41, 75 n.30 (1974). Plainly there is no such conflict of rights here between the Secretary and the claimant.

While the Secretary in his brief (pp. 23-24) suggests that prior hearings should not be afforded because people might request hearings solely for purposes of delay, by that logic he should not even defer reductions pending written reconsideration, as is now his practice, nor should he afford prior hearings in SSI cases, as is also his practice, since some people might just as well use that as a mechanism for delay. Unlike public assistance cases, where a family may suddenly become possessed of income or resources and ineligible for further assistance, and hence not subject to recoupment of over-payments, survivors' bene-

fits are paid at least until a child reaches age 18, and as the Secretary's brief points out (p.27 n.17) a mother's earnings, if any, do not result in any reduction of benefits to the children.* This case is not like Mitchell, where the creditor's property interest was "steadily and irretrievably eroded." (416 U.S. at 608) There is absolutely no legitimate fiscal interest of the Secretary in not affording full-fledged prior hearings.**

The Court in Mitchell also pointed to the availability of damages for a wrongful seizure, but there the damages included costs and attorney's fees, and such damages were "not restricted to pecuniary loss;" they included such intangible damages as "injury to social standing or reputation as well as humiliation and mortification." 416 U.S. at 606 & n.8. See 88 Harv. L. Rev. at 77 n.38. Here only back benefits will be repaid; attorney's fees are not recoverable over and above the amount of benefits and in fact may be paid from the benefits. 42 U.S.C. section 406(b)(1). Nor are any special damages available here, unlike the Mitchell situation.

Plainly also the Court has recognized that when a person is at the margin the loss of the means of sustenance cannot be

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* The minor plaintiffs here were aged 8 and 9 (App. 4), so they had years of eligibility left for any recoupment of overpayments.

** Possible increased costs (Appellants' brief, p. 24) are plainly not a sufficient basis for denying prior hearings. See Bell v. Burson, 402 U.S. 535, 540-541 (1971); Goldberg v. Kelly, 397 U.S. 254, 261 (1970); Shapiro v. Thompson, 394 U.S. 618, 633 (1969). Richardson v. Perales, 402 U.S. 389 (1971) is simply not applicable since it dealt not with a reduction or termination of benefits, but proceedings on an initial application (402 U.S. at 393, 407). Even in the public assistance program, involving over thirteen million beneficiaries, there is only one hearing for every one hundred beneficiaries in a given year. M. Carrow, Administrative Justice Comes of Age, 60 A.B.A. Journal 1396 (1974).

adequately redressed by retroactive benefits paid years later. Retroactive payments were available in Goldberg but the absence of a full prior hearing was not justifiable on that basis (397 U.S. at 260 & n.6). In Mitchell the Court obviously felt that the loss of the consumer goods there was plainly less severe than in the case of the loss of the ongoing means of family support, since the Court distinguished Sniadach v. Family Finance Corp., supra, as involving wages, "'a specialized type of property.'" (416 U.S. at 614 quoting 395 U.S. at 340). Here, of course, the plaintiffs suffered a large reduction in their recurring monthly benefits, their means of support like wages.

The Court in Mitchell also noted that the issues were quite limited on the merits after a sequestration of property. The seller only needed to establish "the probability that his case will succeed," and the Court pointed out that the issue on this preliminary question "turns on the existence of the debt, the lien and the delinquency. These are ordinarily uncomplicated matters that lend themselves to documentary proof." (416 U.S. at 609) Here, however, the issues are much more complicated, involving more than a temporary determination, and resolution of the dispute requires far more than simply a showing that ultimate success is likely. The hearing here considered 37 exhibits totalling 82 pages, and required resolving a dispute about who had fathered children over four years before. Since the purported father was dead, the relevance of and necessity for testimony by the mother of the disputed children is obvious.

The fact is also that the high rate of reversals in Social Security administrative proceedings demonstrates that the questions in such cases are frequently complex.* By 1970 the reversal rate at the hearing stage was 41.6% for all types of cases. R. Dixon, The Welfare State and Mass Justice: A Warning from the Social Security Disability Program, 1972 Duke L. J. 681, 696 n.74. And on cases appealed to federal courts on denials of claims the reversal rate was near 40%. R. Dixon, Social Security Disability and Mass Justice, A Problem in Welfare Adjudication at 5 (1973) (expanded version of Duke L. J. article).

In light of all of the factors present here, even under the recent decision in Mitchell the result below is clearly correct. Due process requires that recipients of survivor's benefits be afforded the opportunity for an oral hearing prior to a reduction of their benefits.

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* Simpler factual disputes, of course, should likewise be simpler, faster and cheaper for a hearing officer to decide.

POINT II

THE DISTRICT COURT PROPERLY DETERMINED THAT THIS ACTION SHOULD BE MAINTAINED AS A CLASS ACTION

The Secretary belatedly contends that this is not a proper class action since notice was never given to the class. That contention was first raised below only after the District Court had rejected all of the defendant's contentions and he moved to amend the judgment.* (App. 149). Plainly the defendant cannot now contend that notice should have been given prior to the District Court's joint determination of the class action and the merits, since his counsel consented to that procedure in open court. (App. 54, 116, 147).** Of course, in reviewing a class action ruling

> the judgment of the trial judge should be given the greatest respect and the broadest discretion, particularly if, as here, he has canvassed the factual aspects of the litigation.

City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295, 298 (2d Cir. 1969). Accord, Bermudez v. U.S. Dept. of Agriculture, 490 F.2d 718, 725 (D.C. Cir. 1973); Gold Strike Stamp Co. v.

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* The motion was denied (App. 156). It is not clear whether the motion was denied on the merits, or as untimely under Rule 59(e) (App. 150), or both. Cf. Spurgeon v. Delta Steamship Lines, Inc., 387 F.2d 358 (2d Cir. 1967).

** Notice is not generally given until after a determination on the class action motion, since the class has not been finally determined until then. As Judge Frankel has put it, "There is no occasion for any notice until after the propriety of the class action has been determined." M. Frankel, Some Observations Concerning Civil Rule 23, 43 F.R.D. 39, 40-41 (1967). See A. Miller, Problems of Giving Notice in Class Actions, 58 F.R.D. 313, 317 (1973).

Christensen, 436 F.2d 791, 792-793 (10th Cir. 1970). Plainly the District Court was familiar with the factual context here since the class determination was deferred until the decision on the merits. The lack of notice here was proper under the circumstances and under the broad discretionary power of the Court under Rule 23(d)(2) of the Federal Rules of Civil Procedure to require notice only where necessary "for the protection of the members of the class or otherwise for the fair conduct of the litigation. ..."

The Secretary contended below that notice was required by the Supreme Court's decision in Eisen v. Carlisle & Jacquelin, 94 S.Ct. 2140 (1974).* (App. 149). The defendant's reliance on that case is plainly misplaced, as Mr. Justice Powell made clear in Eisen. He pointed out that the Court was only concerned

> with the notice requirements of subdivision (c)(2), which are applicable to class actions maintained under subdivision (b)(3). By its terms subdivision (c)(2) is inapplicable to class actions for injunctive or declaratory relief under subdivision (b)(2). (94 S.Ct. at 2152 n.14) (Emphasis supplied).

Here, of course, the case was brought under Rule 23(b)(2) of the Federal Rules of Civil Procedure, so Eisen is plainly inapplicable, as

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* The defendant's motion to amend the judgment referred solely to the Supreme Court's Eisen decision, but his memorandum of law on the motion (not in the appendix) also adverted to due process.

are the notice requirements of Rule 23(c)(2) which Eisen construed.*

The defendant's argument must ultimately rest on his contention that due process requires formal notice in every case, no matter what the circumstances which led the District Court, in its sound discretion, not to expressly require notice. The basis of that argument is Judge Medina's dictum in Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564 (2d Cir. 1968), that "notice is required as a matter of due process in all representative actions." Eisen was, of course, not an action for injunctive or declaratory relief susceptible to class action treatment under Rule 23(b)(2), as Judge Medina there recognized and Mr. Justice Powell subsequently reiterated; that case involved claims for treble damages under the antitrust laws. The consideration of the requirements of due process where the relief sought is limited to the enforcement of constitutional rights was simply not before this Court in Eisen.

Other courts, including several three judge courts in this Circuit have had occasion since Judge Medina's decision in Eisen to explicitly consider the question of whether notice is required

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* Rule 23(b)(2), not fully quoted in the Appellant's Brief (p. 12 n.9), applies where

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Such final declaratory relief was granted here.

Rule 23(c)(2) requires that if the case is brought under Rule 23(b)(3) the members of the class must be given "the best notice practicable under the circumstances." The Rule is silent on notice in 23(b)(2) cases.

by due process in all cases brought pursuant to Rule 23(b)(2). While the cases have come to conflicting conclusions, the most recent and thoroughgoing decisions have held that notice is not automatically required in every case under Rule 23(b)(2).*

The most recent and considered of these cases is Lynch v. Household Finance Corp., 360 F.Supp. 720 (D. Conn. 1973; 3 judge court). There the panel of judges, including Circuit Judges Anderson and Timbers, was faced with a claim quite similar to the claim here, namely a challenge on due process grounds to pre-judgment garnishment without a prior hearing. The court in Lynch found for the plaintiffs and held that such procedures violated due process because no prior hearing was afforded, just as the District Court held in this case.

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* See, e.g. for the proposition that notice is not required, Lynch v. Household Finance Corp., 360 F.Supp. 720, 722 (D. Conn. 1973; 3 judge court); Woodward v. Rogers, 344 F.Supp. 974, 980 n.10 (D.D.C. 1972), aff'd 486 F.2d 1317 (D.C. Cir. 1973); Francis v. Davidson, 340 F.Supp. 351, 361 (D.Md. 1973; 3 judge court) aff'd 409 U.S. 904 (1970); Johnson v. City of Baton Rouge, 50 F.R.D. 295, 301 (E.D. La. 1970). See also Hammond v. Powell, 462 F.2d 1053, 1055 (4th Cir. 1972); Yaffee v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972); Johnson v. Georgia Highway Express, 417 F.2d 1122, 1125 (5th Cir. 1969); Smith v. Vowell, 379 F.Supp. 139, 146 (W.D. Tex. 1974); Hooks v. Wainwright, 352 F.Supp. 163, 166 (M.D. Fla. 1972); Wilczynski v. Harder, 323 F.Supp. 509, 512 n.3 (D. Conn. 1971; 3 judge court); Solman v. Shapiro, 300 F.Supp. 409, 411 n.1 (D.Conn. 1969; 3 judge court), aff'd 396 U.S. 5 (1969).

Cases in accord with Eisen include Alexander v. Avco Corp., 380 F.Supp. 1282, 1286 (M.D. Tenn. 1974); Arey v. Providence Hospital, 55 F.R.D. 62, 70-71 (D.D.C. 1972); United States ex rel. Walker v. Mancusi, 338 F.Supp. 311, 316 n.4 (W.D.N.Y. 1971), aff'd 467 F.2d 51 (2d Cir. 1972); Lopez v. Wyman, 329 F.Supp. 483, 486 (W.D.N.Y. 1971), aff'd 404 U.S. 1055 (1972); Clark v. American Marine Corp., 297 F.Supp. 1305, 1306 (E.D. La. 1969). Cf. Cranston v. Freeman, 290 F.Supp. 785, 787-788 (N.D.N.Y. 1968), reversed sub nom. Cranston v. Hardin, 428 F.2d 822 (2d Cir. 1970), cert. denied sub nom. Duncan v. Cranston, 401 U.S. 949 (1971).

On the issue of whether due process required that notice be given to all the members of the class Judge Anderson stated for the unanimous court:

> Notice to members of the class was neither given nor required in this case. [citations omitted] The interests of the absent parties were fairly insured because there are no money damages, there is no factual issue to be resolved, counsel for the named parties adequately represents the interests of the classes, the Commercial Law League is a participant as an amicus curiae for the defendants, and the legal constitutional issue is not complex in light of recent Supreme Court decisions. Although it is suggested that dictum in Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564-565 (Cir. 1968), requires notice in all class actions, see Moore [¶¶23.55, 23.72], we read Eisen simply to say that notice is required in all class actions when due process so requires. (360 F.Supp. at 722 n.3)

Applying the factors enumerated there to this case the same conclusion results. There are no money damages; there is no disputed factual issue but only the constitutional claim; counsel for the plaintiffs have successfully represented the plaintiffs and the class and the defendant government official has been represented by the office of the United States Attorney and is represented on appeal by specialized appellate counsel from the Department of Justice; and the issue on the merits, as is demonstrated supra, is not at all complex. Those factors were determinative on the question of whether notice was required as a matter of due process in Lynch, and the application of that analysis here requires the same result.

In Woodward v. Rogers, 344 F.Supp. 974 (D.D.C. 1972), aff'd 486 F.2d 1317 (D.C. Cir. 1973), the same sort of analysis was applied. There the plaintiffs presented only a constitutional claim for declaratory and injunctive relief against certain passport rules. The court took note of the Eisen decision but reached a different result, stating:

> In the particular circumstances of this case, however, where the adequacy of the representation of the class interests by the named parties is clear, where no apparent purpose would be served by notice to this wide ranging class even if notice were at all practicable, and where, indeed, judgment is in favor of the class, the essential requisites of due process have been met without further notice. (344 F.Supp. at 980 n.10).

The "particular circumstances" of this case,upon which any sort of due process analysis must rest, are like those in Woodward. Notice would serve no purpose other than to inform the members of the plaintiffs' class that they now had additional rights to hearings, which rights will surely be explained once they are implemented just as the current procedures are routinely explained, as required by the Social Security Act, 42 U.S.C. section 405(b), and the Secretary's own regulations, 45 C.F.R. sections 404.907, 404.915 and 404.937a. (See, e.g. App. 13).

The lack of notice here has averted what would otherwise have been a chaotic situation. The decision and judgment here both require that the Secretary establish new procedures, but only "as soon as practically convenient." (App. 145, 148). The Secretary has yet to change his procedures (Appellant's brief, p. 19), apparently deeming it not "practically convenient" to do so while this case was on appeal and thus subject to reversal, since the new pracedures might no sooner be implemented than they could be abandoned if the Secretary ultimately prevailed.

So the decision and judgment here invited the situation which has resulted, where the Secretary has been ordered to provide for prior hearings but his time to implement the District Court's mandate is not clearly fixed. It would do no good to notify members of the class that they now had the right to a prior hearing, if, in fact, such hearings were not being provided because they were not yet "practically convenient." Just that problem is avoided by the sensible procedure to which the Secretary now objects.

The class here consists of "all persons who are now or may in the future be entitled to receive survivors' benefits under the Social Security Act whose benefits have been or may be reduced without a prior hearing." (App. 146). As to all those class members whose benefits have not yet but "may be" reduced, notice of their

rights to prior hearings given at the time they are notified of the initial determination to reduce their benefits will be just as adequate as the notice currently given about their current appeal rights. For those whose benefits have been reduced without a prior hearing and who have taken or still have time to take an appeal, the Secretary would surely be derelict if once the judgment were implemented he continued such reductions.

Other courts faced with this sort of practical problem have concluded that a giving of routine notice by the defendant is sufficient, particularly in light of the discretionary notice provisions of Rule 23(d)(2), which authorizes, but does not require, the court to "make appropriate orders ... for the protections of the members of the class or otherwise for the fair conduct of the action that notice be given." So, for example, in Musselman v. Spies, 343 F.Supp. 528, 536 (M.D. Pa. 1972; 3 judge court), where the court invalidated provisions for the ex parte distraint of property, notice was to be given by including it along with any notices for the distraint of property given to members of the class. Courts have likewise relied on notice given by the defendants by such indirect means as posting signs in their offices. See, e.g. Fujishima v. Board of Education, 460 F.2d 1355, 1360 (7th Cir. 1972); Lopez v. Wyman, 329 F.Supp. 483, 486 (W.D.N.Y. 1971), aff'd 404 U.S. 1055 (1972). Here the notice which class members will receive in the regular course should the Secretary propose to reduce their benefits is sufficient.

The cases which have concluded that due process is required in all cases either uncritically adopt the dictum in Eisen or else

are based on the very unique situation arising in certain Selective Service cases cited by the appellant. See, e.g., Schrader v. Selective Service System, 470 F.2d 73 (7th Cir. 1972), cert. denied, 409 U.S. 1085 (1972); Zeilstra v. Tarr, 466 F.2d 111 (6th Cir. 1972); Pasquier v. Tarr, 318 F.Supp. 1350 (E.D. La. 1970), aff'd 444 F.2d 116 (5th Cir. 1971).

Of course, the defendant here is in no position to rely on those Selective Service cases, which deal with the res judicata effects of decisions in other courts.* As the Advisory Committee's Note to Rule 23 pointed out

> Although thus declaring that the judgment in a class action includes the class as defined, subdivision (c)(3) does not disturb the recognized principle that the court conducting the action cannot predetermine the res judicata effect of the judgment; this can be tested only in a subsequent action. See Restatement, Judgments §86, comment (h), §116 (1942). (39 F.R.D. 98, 106 (1966)).

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* From the defendant's viewpoint it is irrelevant whether or not there is a class action, since the defendant would presumably comply with the final ruling of a federal court. See Galvan v. Levine, 490 F.2d 1255, 1261 (2d Cir. 1973), cert. denied 94 S.Ct. 2652 (1974); Vulcan Society v. Civil Service Commission, 490 F.2d 387, 399 (2d Cir. 1973). While Galvan indicates that the District Court may, in its discretion, conclude that a class action is unnecessary, the opposite conclusion may also be drawn. See United States ex rel Sero v. Preiser, No. 74-1944 (2d Cir. Nov. 6, 1974), where this Court authorized a habeus corpus proceeding on behalf of a group analogous to a Rule 23 class because, among other things, " a decision on the constitutionality ... would, as a practical matter, most likely be dispositive of the interests of the other members not parties to the adjudication." (Slip opn. at 270-271 n.9).

See Hansberry v. Lee, 311 U.S. 32, 42 (1940); Cherner v. Transitron Corp., 221 F.Supp. 48, 53 (D.Mass. 1963); Note, Binding Effect of Class Actions, 67 Harv. L. Rev. 1059, 1060 (1954). The leading cases on the validity of class action judgments are, in fact, based on such collateral attacks. See, e.g. Hansberry v. Lee, supra; Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921). See also Note, Collateral Attack on the Binding Effect of Class Action Judgments, 87 Harv. L. Rev. 589 (1974). If the Secretary wishes to subsequently decline to follow a ruling by this Court, that is for another day.

The Selective Service cases are unique in their procedural posture; they arose when purported class members sought to take advantage of a District Court decision which was ultimately reversed. Gregory v. Hershey, 311 F.Supp. 1 (E.D. Mich. 1969), reversed sub nom. Gregory v. Tarr, 436 F.2d 513 (6th Cir. 1971), cert. denied, 403 U.S. 922 (1971). That reversal was based on a lack of subject matter jurisdiction which, of course, is always subject to collateral attack. Restatement, Judgments, §11 (1942). The plaintiffs claimed that during the interstitial period between the District Court's entry of judgment, not stayed on appeal, and the reversal of that judgment by the Court of Appeals, the defendant had denied them fatherhood exemptions in violation of the District Court class action judgment.

While the purported class members were relying on a judgment, it was ultimately reversed for lack of subject matter jurisdiction, so there never was a valid class to begin with. Accordingly their claim that they stood to benefit from the District

Court ruling collapsed. Indeed, in at least one of these cases, Pasquier v. Tarr, supra, it is apparent that the Court of Appeals was actually reaching the plaintiff's claim separate and apart from the Gregory judgment, although relying on Gregory as precedent. The Court stated, "We follow Gregory and hold that preinduction relief was properly denied." (444 F.2d at 117).

The only rationale advanced by the defendant for requiring formal notice here is that the question on the merits is one of "substantial importance" to the class. (Appellant's brief, p.14). In light of the incontestable benefit afforded the class by this action and the defendant's continued opposition to affording Social Security recipients the same hearing rights as he accords welfare recipients, it is plain that his sudden concern for the giving of notice is merely a ploy to insulate his procedures from effective challenge. Cf. Francis v. Davidson, 340 F.Supp. 351, 361 (D. Md. 1972; 3 judge court) aff'd 409 U.S. 904 (1972), where class relief was granted in order to avoid mootness claims like those asserted by the defendant here.

The District Court properly exercised its discretion in granting class action relief here. The interests of the class members have been protected and the routine notice they will receive if their benefits are to be reduced is adequate.

POINT III

THE DISTRICT COURT PROPERLY DETERMINED THAT THE CASE WAS NOT MOOT.

Not satisfied with asserting that this case ought not to proceed as a class action, the Secretary seeks to avoid any judicial review of the constitutionality of his procedures at all. He has asserted that this case is moot ever since his intransigent stance resulted in the District Court's ordering him to promptly provide a hearing for the Frosts.(App. 40). Fully cognizant of the hardships befalling the plaintiffs as a result of this drastic cut in their benefits, the Secretary proceeded to assert that he would continue to pay the reduced level of benefits without holding a hearing "pending the determination of this action." (App. 28). The District Court was understandably reluctant to simply order a restoration of the plaintiffs' benefits since the Secretary had also threatened that, "If the plaintiffs here must receive full benefits, then the benefits for those [other] children must be eliminated." (App. 30) Apparently the Secretary intended to do so without a hearing for those other children either, despite his assertion that this "would raise a more serious constitutional question than the one raised by the plaintiff." (App. 31).

Thus by his threat of a prolonged denial of a hearing for the plaintiffs, combined with his threats of other benefit terminations of concededly dubious constitutionality, the Secretary left the District Court few options but to order a prompt hearing. Having made that result necessary to protect the plaintiffs' rights

during the course of what was obviously going to be a fairly lengthy litigation, the Secretary is in no position to assert that the case is moot because of that hearing having been conducted. To hold otherwise would be to condone a defendant's "rendering a case moot by his own conduct," which the appellant concedes at p. 19 of his brief is barred by United States v. W. T. Grant Co., 345 U.S. 629 (1953).

The most recent relevant Supreme Court case on the question of mootness is Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974). There employers whose plants had been struck sued for injunctive and declaratory relief that strikers should not be eligible for public assistance under the state welfare program. Pending determination in the District Court the labor dispute was settled, the strike was over, and the immediate problem was resolved (416 U.S. at 120). Despite that contention the District Court proceeded to determine the case on the merits (416 U.S. at 120-121). The Court of Appeals remanded with instructions to vacate and dismiss for mootness, 469 F.2d 911, 922 (3d Cir. 1972), and the Supreme Court then reversed.

Just as Judge Travia concluded in his decision here (App. 143-144),the Supreme Court in Super Tire determined that while injunctive relief was no longer appropriate, declaratory relief was still proper. Accord Cleaver v. Wilcox, 499 F.2d 940, 945-946 (9th Cir. 1974). See DeFunis v. Odegaard, 416 U.S. 312, 317 (1974), where the Court pointed out that one flaw in DeFunis' case was that he had only sought injunctive relief. As the Court stated in

Super Tire, one consideration in determining whether there was a sufficiently immediate and real controversy between the parties to warrant declaratory judgment is that the case "involves governmental action." As a result the

> short-term nature of that action makes the issues presented here 'capable of repetition yet evading review,' so that petitioners are adversely affected by government 'without a chance of redress.' Southern Pac. Terminal Co. v. I.C.C., 219 U.S. 498, 515 ...(1911). (416 U.S. at 122).

Here, of course, declaratory relief was sought and granted.

The Court in Super Tire also pointed to other recent cases in which claims of mootness had been rejected, stating that

> The important ingredient in these cases was governmental action directly affecting, and continuing to affect, the behavior of citizens in our society. (416 U.S. at 126).

See, e.g. Roe v. Wade, 410 U.S. 113, 125 (1973); Storer v. Brown, 415 U.S. 724, 737 n.8 (1974); Rosario v. Rockefeller, 410 U.S. 752, 756 n.5 (1973); Moore v. Ogilvie, 394 U.S. 814, 816 (1969). So the argument that governmental involvement overcomes the policies against mooting a case will not work; governmental involvement is a reason why a case is not moot. See Dunn v. Blumstein, 405 U.S. 330, 333 n.2 (1972), where a durational residency test was challenged, and during the course of the case the election took place and the plaintiff subsequently met the time requirements. The Court indicated that the case was not moot, since it was "capable of repetition yet evading review."

There can be no doubt that this case is capable of repetition, since the Secretary concedes in his brief (p. 19) that he "has not changed his procedures." Accordingly, as in Super Tire, "the challenged governmental activity in the present case is not contingent, [and] has not evaporated or disppeared. ..." (416 U.S. at 122).

As the Court alternatively described the situation in Super Tire ,"This policy is fixed and definite." (416 U.S. at 124). In so holding the Court explicitly distinguished the case from Oil Workers Union v. Missouri, 361 U.S. 363 (1960), on which the Secretary principally relies. (Appellant's brief, pp. 16-18). In Oil Workers repetition required both another strike, unlikely in any event, and a discretionary judgment by the Governor to take possession of the employer, a public utility. In Super Tire, however, that element of discretion was absent. Such discretion is absent here also, and the fact is that the issue remains an ongoing problem - - there are thousands of reductions of Social Security survivors' benefits each year. (App. 36). Like Super Tire, "The present case has a decidedly different posture [from Oil Workers]". (416 U.S. at 123).

Nor does Committee to Free the Fort Dix 38 v. Collins, 429 F.2d 807 (3d Cir. 1970), offer a basis for the defendant's claim of mootness. In that obviously politically sensitive case the Court pointed out that the case involved but a single proposed demonstration at Ft. Dix for which a permit had been denied. The date for the demonstration was long gone, no subsequent requests

for like demonstration had been made or denied, and the defendant himself was no longer even in command of Ft. Dix (429 F.2d at 811-812). The relief sought had been limited, and absent a showing that "future demonstrations of the type requested here will again be sought or denied by the present or future commanders at Ft. Dix," relief was denied. (Id.) Here the defendant not only concedes, but affirmatively asserts that he intends to continue the challenged practices.

So this Court has recently rejected the contention that the return of a prisoner to the facility from which he had been transferred for disciplinary purposes without a prior hearing mooted the case. Newkirk v. Butler, 499 F.2d 1214, 1219 (2d Cir. 1974). As Judge Mansfield wrote, such an argument has "no merit." (Id.) The Court there rejected the theory advanced by the appellant here that the case was moot because the plaintiffs only might, and not necessarily would, be subjected to further proceedings without prior hearings, pointing to the "continued insistence" of the governmental official there on the correctness of his policy, just like the Secretary's position here. That result is also plainly proper under United States v. W. T. Grant Co., supra, where the Court pointed to the "heavy burden" necessary to support a claim of mootness; the defendant must "demonstrate that 'there is no reasonable expectation that the wrong will be repeated.'" (345 U.S. at 633).

The fact is that giving Mrs. Frost a hearing after terminating her benefits did not resolve the problem of her right to a hearing before such a termination. In prior hearing cases the

immediate needs of the plaintiffs often require immediate relief, so the fact that benefits have been restored or a hearing finally held has not mooted the case. Such, in fact was the very situation in Kelly v. Wyman, 294 F.Supp. 893, 908 (S.D.N.Y. 1968), aff'd sub nom Goldberg v. Kelly, 397 U.S. 254 (1970), where the Court pointed out that the mere fact that a hearing "was finally accorded to [the plaintiffs] months after their complaint was filed and after termination of benefits does not dispose of the case." The Supreme Court agreed. (397 U.S. at 256 n.2). Accord, Mindo v. N. J. Dept. of Labor & Industry, 443 F.2d 824, 825-826 (3d Cir. 1971); Steinberg v. Fusari, 364 F.Supp. 922, 938 (D. Conn. 1973; 3 judge court); Torres v. New York State Dept. of Labor, 318 F.Supp. 1313 (S.D.N.Y. 1970);* Vaughan v. Bower, 313 F.Supp. 37, 40 (D. Ariz. 1970; 3 judge court); aff'd 400 U.S. 884 (1970); Adens v. Sailer, 312 F.Supp. 923, 926 (E.D. Pa. 1970); Dermott School District v. Gardner, 278 F.Supp. 687 (E.D. Ark. 1968). Cf. Davis v. Weir, 497 F.2d 139, 143 n.5 (5th Cir. 1974). As Judge Friendly succinctly stated recently in Galvan v. Lavine, 490 F.2d 1255, 1260 n.3 (2d Cir. 1973), cert. denied 94 S.Ct. 2652 (1974), "Defendant's argument that this development [payment of the claim] moots the issue before this court, is, however, devoid of merit [citing Mindo]." These cases all demonstrate the fact that where prior hearings are concerned, dismissing cases as moot once a hearing was held would always result in their "evading review."

In a case where a prior hearing is denied and the plaintiff claims the right to one, he or she will almost certainly get his hearing before the case is over, one way or another. Thus

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* Torres was not based solely on the fact that the plaintiff sought restoration of benefits withheld, as the appellant contends in his brief (p.19). It was based largely on the voluntary abandonment of illegal conduct theory plus the fact that it was a class action.

like the abortion situation, in Roe v. Wade, 410 U.S. 113, 125 (1973), this type of case is one inherently "capable of repetition yet evading review." Faced with that situation recently in another case involving prior hearings in the Social Security system, the court in Green v. Weinberger, 1A CCH Unempl. Ins. Rep. ¶17,746 (D. D.C. Jul. 29, 1974) summed up the situation thusly:

> [P]laintiffs are confronted with an administrative scheme which guarantees that they will have exhuasted the administrative process, i.e., received a post-termination hearing, before a court can pass on their constitutional claims. ... In other words, plaintiffs invariably will be afforded the evidentiary hearing which they claim is required before benefits are cut off, at some time before the termination of their benefits, but before the issue can be judicially resolved.

The Court in Green also recognized that if the claim of the named plaintiff were moot, the fact that the case is a class action makes it still viable and the entire case cannot be dismissed as moot. The Supreme Court recognized this in Dunn v. Blumstein, supra; and in DeFunis v. Odegaard, supra, the court relied on the fact that "DeFunis did not cast his suit as a class action," as a reason for dismissing his case as moot. (416 U.S. at 317). Suffice it to say that the Courts of Appeals and District Courts have recognized that where a case has been brought as a class action and the named plaintiffs had standing to sue at the outset, as the Frosts clearly did here, the case may proceed whether or not the named plaintiffs' claim became moot during the litigation.

See, e.g. Cleaver v. Wilcox, 499 F.2d 940, 942-943 (9th Cir. 1974); Lewis v. Sandler, 498 F.2d 395, 398 (4th Cir. 1974); Davis v. Weir, 497 F.2d 139, 143 (5th Cir. 1974); Steinberg v. Fusari, 364 F.Supp. 922, 928 (D. Conn. 1973, 3 judge court); Woodward v. Rogers, 344 F.Supp. 974, 979 (D. D.C. 1972) aff'd 486 F.2d 1317 (D.C. Cir. 1973); Wheeler v. State of Vermont, 335 F.Supp. 856, 860 (D. Vt. 1971; 3 judge court); Thomas v. Clarke, 54 F.R.D. 245, 252 (D. Minn. 1971; 3 judge court); Torres v. New York State Dept. of Labor, 318 F.Supp. 1313, 1317 (S.D.N.Y. 1970; 3 judge court).

The importance of class relief in overcoming the claim of mootness was explained in Thomas v. Clarke, supra:

> A determination that the statute is unconstitutional merely as to [the named plaintiff] would perhaps prevent future seizures [of property without a hearing] but it would do nothing for those whose property has been replevied during the past ten months."

So here the ultimate resolution of this case is important to persons whose survivors' benefits are reduced and who have sought administrative review but not yet had a hearing and decision. For them the ultimate resolution of this case should mean a restoration of benefits pending a hearing and decision, and the Secretary should not be able to force them all to start over at square one to obtain such hearing procedures.

CONCLUSION

For the foregoing reasons the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of December, 1974, I served the foregoing brief upon counsel for the appellant, by causing copies to be mailed, postage prepaid, to:

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